No. 79-1144

IN THE

Supreme Court of the United

OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC.,
Petitioner,

v.

RADCLIFF MATERIALS, INC.,
JIMCO, INC., and OKC DREDGING, INC.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF WESTVACO CORPORATION AS AMICUS CURIAE

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TABLE OF CONTENTS

PAGE

Table of Authorities iii

Interest of the Amicus Curiae 1

A. *In re Corrugated Container Antitrust Litigation*, M.D.L. 310 (S.D. Tex.) 2

1. Class Actions 2

2. Opt-out Actions 3

B. *Franklin Container Corp. v. International Paper Co.*, No. 77-3204 (E.D. Pa.) 3

Summary of Argument 4

Argument 4

I. Federal Courts Have the Power to Recognize Contribution in Antitrust Cases 4

II. Contribution and Claim Reduction Promote Fairness 7

A. This Court and Other Federal Courts Permit Contribution to Ensure Fairness 7

B. Contribution and Claim Reduction Will Promote Fairness By Eliminating Settlement Coercion and "Sweetheart" Deals 9

III. Contribution and Claim Reduction Promote Policies Underlying the Antitrust Laws 12

A. Contribution Deprives Violators of the Fruits of Their Illegal Conduct 12

1. "Scot Free" Violators 12

2. "Sweetheart" Deals 13

B. Contribution Promotes Deterrence 13

PAGE

IV. Contribution and Claim Reduction Will Not Complicate Antitrust Cases 15

A. Contribution Will Not Add New Issues to Antitrust Price-Fixing Cases 15

B. Contribution Will Not Present Procedural Manageability Problems 16

Conclusion 17

Appendix A-1

TABLE OF AUTHORITIES

Cases: PAGE

Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co., 385 F. Supp. 230 (S.D.N.Y. 1974) 14

Arth Main Street Drugs v. Beer Distributors, Inc., 26 Fed. R. Serv. 2d 87 (N.D. Ind. 1978)..... 10

Board of County Commissioners v. United States, 308 U.S. 343 (1939)..... 4

Cackling Acres, Inc. v. Olson Farms, Inc., 541 F.2d 242 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977) 12, 13

Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972)..... 11

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Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) 4

Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106 (1974) 5, 7, 8

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PAGE

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In re Fine Paper Antitrust Litigation, 446 F. Supp. 759 (J.P.M.L. 1978)..... 9

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Glus v. G.C. Murphy Co., 629 F.2d 248 (3d Cir.), *petition for cert. filed sub nom. Retail Wholesale & Department Store Union v. G.C. Murphy Co.*, 49 U.S.L.W. 3252 (Sept. 22, 1980) (No. 80-461) 5, 8

Gomes v. Brodhurst, 394 F.2d 465 (3d Cir. 1968)..... 8, 11

In re Government Auto Fleet Sales Antitrust Litigation, 328 F. Supp. 218 (J.P.M.L. 1971) 9

Grogg v. General Motors Corp., 72 F.R.D. 523 (S.D.N.Y. 1976) 5

In re Gypsum Cases, 386 F. Supp. 959 (N.D. Cal. 1974) 10

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Illinois v. City of Milwaukee, 406 U.S. 91 (1972) 4, 5

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) 12

Jeffrey v. Southwestern Bell, 518 F.2d 1129 (5th Cir. 1975)..... 11

PAGE

Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 110 A.2d 24 (1954) 11

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Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975) 5, 8, 9

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Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970) 4

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Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 10

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PAGE

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Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173 (1942) 6

Southern Construction Co. v. Pickard, 371 U.S. 57 (1962) 16

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931) 15

Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) 4

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Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971)..... 6

Federal Rules of Civil Procedure:

Rule 13..... 16

Rule 14..... 16

Rule 42(b) 16

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PAGE

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Panel Discussion: Private Actions—The Purposes Sought And The Results Achieved, 43 Antitrust L.J. 73 (1974) 13

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PAGE

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BRIEF OF WESTVACO CORPORATION AS AMICUS CURIAE

Westvaco Corporation ("Westvaco") submits this Brief as *amicus curiae* with the consent of all parties hereto.[1] Westvaco urges this Court to recognize the right of contribution for defendants in antitrust cases and the corollary right of claim reduction.

INTEREST OF THE AMICUS CURIAE

Westvaco is a defendant in *In re Corrugated Container Antitrust Litigation*, M.D.L. 310 (S.D. Tex.) ("M.D.L. 310"), and in *Franklin Container Corp. v. International Paper Co.*, No. 77-3204 (E.D. Pa.) ("*Franklin Container*"). In these vari-

[1] All letters requesting and granting consent to the filing of this Brief have been filed with the Clerk of the Court.

ous actions, Westvaco has alleged (i) cross-claims for contribution for any damages attributable to other defendants which Westvaco might be required to pay, and (ii) affirmative defenses of "claim reduction" asserting that plaintiffs, by settling with any other defendants, have reduced their claims against Westvaco by the amount of damages fairly allocable to such defendants.

A. *In re Corrugated Container Antitrust Litigation*, M.D.L. 310 (S.D. Tex.)

M.D.L. 310 is the consolidation pursuant to 28 U.S.C. § 1407 of (i) forty-four class actions, and (ii) eighteen opt-out non-class actions.[2] All actions seek treble damages.

1. Class Actions

The class actions allege that thirty-seven corrugated container manufacturers named as defendants participated in a nationwide conspiracy to fix, raise, maintain and stabilize the prices of corrugated containers and sheets. Class plaintiffs have claimed their damages run into billions of dollars. Thirty-five defendants paid over $320 million to settle these claims.[3]

After more than three months of trial before a jury, Westvaco entered into a settlement with class plaintiffs on September 3, 1980 by paying $975,000, which was the approximate amount it would have cost Westvaco to complete the trial. By its terms, Westvaco's settlement agreement reduced plaintiffs' claims against any other defendants by the amount of damages which could be allocable to Westvaco, *i.e.*, claim reduction.[4]

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[2] These are cases where the plaintiffs opted out of the class. Westvaco is a defendant in 11 of these cases.

[3] *See* pages 9-11, *infra*.

[4] The Westvaco settlement agreement was the only one incorporating such a feature. The sole defendant which did not settle the class actions and which was subsequently found by the jury to have been a member of the alleged conspiracy now faces enormous damage exposure in the absence of contribution or claim reduction.

The settlement was preliminarily approved on September 16, 1980.[5]

2. Opt-out Actions

The eighteen opt-out actions also allege a conspiracy to fix the prices of corrugated containers and sheets. Discovery in these actions is scheduled for completion by May, 1981. Stipulations of dismissal have been filed on behalf of two of thirty-seven corrugated container manufacturers named as defendants in one or more of these actions. Westvaco has not settled any of the actions. In each of these actions, in the absence of contribution or claim reduction, an individual defendant may ultimately be responsible for damages caused by all of the defendants.

B. *Franklin Container Corp. v. International Paper Co.*, No. 77-3204 (E.D. Pa.)

Franklin Container, a purported class action, alleges that fourteen manufacturers of corrugated containers named as defendants conspired to depress the selling prices of corrugated containers while simultaneously maintaining the prices of linerboard. Six defendants, not including Westvaco, have settled for injunctive relief and damages. Without contribution or claim reduction, each individual defendant may be forced to bear the consequences not only of its own acts but those of all other defendants.

This Court's resolution of the case at bar in all likelihood will determine the legal sufficiency of Westvaco's contribution cross-claims in the M.D.L. 310 opt-out cases and in *Franklin Container.*

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[5] It was agreed that upon preliminary approval Westvaco would seek the dismissal of *Westvaco Corp. v. Adams Extract Co.*, *cert. granted*, 48 U.S.L.W. 3820 (June 16, 1980) (No. 79-972). Certiorari had been granted in that case on the question whether defendants in antitrust cases may assert rights of contribution. Westvaco's motion to dismiss was granted, *cert. dismissed*, 49 U.S.L.W. 3288 (Oct. 20, 1980).

Summary of Argument

This Court in the exercise of its federal common-law powers should recognize rights of contribution and claim reduction in antitrust cases to ensure fairness in the apportionment of damages among defendants.

Contribution and claim reduction will promote fairness by preventing antitrust violators from going "scot free" and eliminating "sweetheart" deals and settlement coercion. Contribution and claim reduction will encourage fair settlements based on the merits of the case.

Contribution promotes the disgorgement and deterrence objectives of the antitrust laws by ensuring that antitrust violators will be held accountable for their acts.

Contribution will not complicate antitrust price-fixing cases by adding new substantive issues or presenting procedural manageability problems. Furthermore, claim reduction will simplify the proof in antitrust cases.

ARGUMENT

I.

Federal Courts Have the Power to Recognize Contribution in Antitrust Cases

This Court may recognize rights of contribution in areas of federal concern by virtue of its power to fashion federal common-law rules to govern problems which "lie in the penumbra of express statutory mandates." *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957).[6]

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[6] *See Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 392-403 (1970); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943); *Royal Indem. Co. v. United States*, 313 U.S. 289, 296 (1941); *Board of County Comm'rs v. United States*, 308 U.S. 343, 349-52 (1939). *See generally* Friendly, *In Praise of Erie — And Of The New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964).

Rules governing the availability of contribution are frequently judicial in origin. Thus, in the absence of statutory provisions, contribution rights have been judicially recognized in many federal cases, including admiralty,[7] securities,[8] employment discrimination,[9] and airline disaster cases.[10] Remedies provided by Congress "are not necessarily the only federal remedies available," and "there is a federal common law" in areas of special federal concern. *Illinois v. City of Milwaukee*, *supra*, 406 U.S. at 103.

Antitrust is clearly an area of special federal concern in which rights of contribution are cognizable as a matter of federal common law. The substantive liability of an antitrust defendant is determined by the provisions of the Sherman Act in conjunction with common-law principles, as this Court has repeatedly recognized:

> Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.

National Society of Professional Engineers v. United States, 435 U.S. 679, 688 (1978) (footnote omitted). As Judge Learned

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[7] *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 111 (1974). *See also United States v. Reliable Transfer Co.*, 421 U.S. 397, 411 (1975).

[8] *Heizer Corp. v. Ross*, 601 F.2d 330, 332-33 (7th Cir. 1979); *Wassel v. Eglowsky*, 399 F. Supp. 1330, 1367 (D. Md. 1975), *affirmed*, 542 F.2d 1235 (4th Cir. 1976).

[9] *Glus v. G.C. Murphy Co.*, 629 F.2d 248, 252-54 (3d Cir.), *petition for cert. filed sub nom. Retail Wholesale & Dep't Store Union v. G.C. Murphy Co.*, 49 U.S.L.W. 3252 (Sept. 22, 1980) (No. 80-461); *Grogg v. General Motors Corp.*, 72 F.R.D. 523 (S.D.N.Y. 1976).

[10] *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975).

Hand stated, "Congress has incorporated into the Anti-Trust Acts the changing standards of the common law, and by so doing has delegated to the courts the duty of fixing the standard for each case." *United States v. Associated Press*, 52 F. Supp. 362, 370 (S.D.N.Y. 1943), *affirmed*, 326 U.S. 1 (1945). *See also Funk v. United States*, 290 U.S. 371, 382 (1933).

As a result, federal courts have routinely resolved issues ancillary to application of the Sherman and Clayton Acts through exercise of federal common-law powers. Thus, it was the federal courts that applied principles of joint and several liability to the antitrust laws by analogizing violators to joint tortfeasors. *City of Atlanta v. Chattanooga Foundry & Pipe-works*, 127 F. 23, 26 (6th Cir. 1903), *affirmed*, 203 U.S. 390 (1906). *See also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 343-48 (1971) (effect of release in antitrust cases); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 137-40 (1968) (availability of *in pari delicto* defense in antitrust cases).

In *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173 (1942), this Court stated:

> When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted.

Id. at 176.

There is no indication in the legislative history of the Sherman Act or the Clayton Act that Congress considered the question of contribution.[11] Accordingly, for all of the foregoing reasons, judicial resolution of the issue is appropriate.

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[11] The Clayton Act expressly provides that persons who violate the Sherman Act shall be subject to civil liability. This Court is not being asked to imply a private cause of action within the meaning of *Cort v. Ash*, 422 U.S.

(footnote continued on following page)

II.

Contribution and Claim Reduction Promote Fairness

The old common-law rule against contribution unfairly forces a defendant to bear the consequences not only of his own acts but also those of his joint tortfeasors. As will be demonstrated below, the obvious inequity of the common-law rule has led federal courts to permit contribution in order to ensure fairness. Contribution and claim reduction in antitrust cases will ensure that antitrust violators do not escape "scot free," and will promote fairness by eliminating settlement coercion and "sweetheart" deals.

A. This Court and Other Federal Courts Permit Contribution to Ensure Fairness

In *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974), this Court permitted contribution between joint tortfeasors in maritime noncollision cases to ensure fairness in the allocation of loss:

> [A] "more equal distribution of justice" can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame. See *The Max Morris*, [137 U.S. 1 (1890)], at 14.

417 U.S. at 111.

A year later, this Court held that the elimination of potential unfairness required judicial adoption of a rule providing for

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66 (1975), or its progeny. In such cases, the Court has examined legislative history to determine whether subjecting a party to implied civil liability for violating a statutory standard of conduct is consistent with congressional intent. In contrast, the question here is simply whether contribution may be asserted against parties whom Congress has expressly intended to be subject to civil liability under the antitrust laws.

"just and equitable" allocation of damages. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 411 (1975). By 1979 this Court observed in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 271-72 n.30 (1979), that a tortfeasor "[n]ormally . . . may seek contribution from another concurrent tortfeasor. . . . Contribution remedies the unjust enrichment of the concurrent tortfeasor."

The principle of "equal distribution of justice," *Cooper Stevedoring, supra*, 417 U.S. at 111, through elimination of unfairness in the allocation of damages has been applied by federal courts in a steady movement toward recognition of contribution rights in numerous areas.[12]

In *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979) ("*Professional Beauty Supply*"), the first appellate court ever to consider the contribution issue in an antitrust context held unequivocally that fairness requires the application of contribution. The court, in relying (*id.* at 1183) upon *Cooper Stevedoring*, recognized that contribution in treble-damage actions was necessary to ensure fundamental fairness and to prevent antitrust violators from going "scot free":

> The fact that one tortfeasor may be held liable for all the damages arising from the antitrust violation necessarily means that other joint tortfeasors may go "scot free." . . .
>
> There is an obvious lack of sense and justice in a rule which permits the entire burden of restitution of a loss for which two parties are responsible to be placed upon one

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[12] *See, e.g., Heizer Corp. v. Ross*, 601 F.2d 330, 331-33 (7th Cir. 1979) (contribution in federal securities fraud cases). *See also Glus v. G.C. Murphy Co., supra*, 629 F.2d 248 (contribution in discrimination cases); *Kohr v. Allegheny Airlines, Inc., supra*, 504 F.2d 400 (airline disaster cases); *Gomes v. Brodhurst*, 394 F.2d 465 (3d Cir. 1968) (Virgin Islands negligence cases); *Martello v. Hawley*, 300 F.2d 721 (D.C. Cir. 1962) (District of Columbia negligence cases).

alone because of the plaintiff's whim or spite, or his collusion with the other wrongdoer.

594 F.2d at 1185-86 (citation omitted).

B. Contribution and Claim Reduction Will Promote Fairness By Eliminating Settlement Coercion and "Sweetheart" Deals

The following examination of a common pattern in antitrust class actions involving multiple defendants demonstrates the abuses resulting from the absence of contribution and claim reduction.

First, there is the commencement of a grand jury investigation of an entire industry. Prior to the completion of such investigation but after it becomes public, numerous treble-damage class actions are brought against substantially all members of the industry whether or not they are under investigation.[13]

Second, the grand jury returns an indictment against a relatively small number of industry members, but the civil actions continue against all defendants whether indicted or not.[14]

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[13] *See, e.g., In re Fine Paper Antitrust Litigation*, 446 F. Supp. 759 (J.P.M.L. 1978); *In re Government Auto Fleet Sales Antitrust Litigation*, 328 F. Supp. 218 (J.P.M.L. 1971). *See generally* Rudnitsky & Blyskal, *Getting into Those Deep Pockets*, Forbes 59, 62 (Aug. 4, 1980).

[14] *Compare United States v. International Paper Co.*, Crim. No. H-78-11 (S.D. Tex. 1978) (nine corporate and nine individual felony indictees) *and United States v. Boise Cascade Corp.*, Crim. No. H-78-12 (S.D. Tex. 1978) (five corporate and 17 individual misdemeanor indictees) *with In re Corrugated Container Antitrust Litigation*, M.D.L. 310 (S.D. Tex.) (37 corporate defendants). All defendants that stood trial in the criminal cases were acquitted. Indeed, treble-damage actions sometimes continue even after the government concludes that there is no basis for criminal or civil charges. *See* Legal Times of Washington, Dec. 15, 1980 at 1, col. 1.

Third, prior to a ruling on class certification, plaintiffs enter into "ice-breaking" or "sweetheart" deals with some defendants, often those which are most culpable.[15]

Fourth, a large class is certified, and in the absence of contribution and claim reduction, all non-settling defendants are thereafter faced with enormous potential liability.[16]

Fifth, as a consequence, a settlement stampede ensues. With each successive settlement in the absence of contribution and claim reduction, the exposure of non-settling defendants increases because the damages allocable to settling defendants remain in the case. Accordingly, plaintiffs demand higher and higher settlement amounts having little or nothing to do with the merits of the claims.[17] As a result, multimillion dollar settlements have become commonplace.[18]

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[15] *See Manual for Complex Litigation*, § 1.46 (1978); Appendix A to this Brief ("App. A"). *See also In re Corrugated Container Antitrust Litigation*, 1979-1 Trade Cases (CCH) ¶ 62,690, at 77,882 (S.D. Tex. 1979).

[16] *See, e.g., In re Corrugated Container Antitrust Litigation*, 80 F.R.D. 244 (S.D. Tex.), *mandamus denied*, No. 78-3684 (5th Cir. 1978). *See also Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 234-35 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *Arth Main St. Drugs v. Beer Distribs., Inc.*, 26 Fed. R. Serv. 2d 87 (N.D. Ind. 1978); *Hooley v. Red Carpet Corp. of America*, 1975 Trade Cases (CCH) ¶ 60,285, at 66,112 (D. Ore. 1975), *appeal dismissed*, 549 F.2d 643 (9th Cir. 1977). *Cf. Reiter v. Sonotone Corp.*, 442 U.S. 330, 345-46 (1979) (Rehnquist, J., concurring); *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). *See generally* Rowe, *On Fostering Fights*, N.Y. Times, Aug. 6, 1980, at A-21.

[17] *See* App. A. *See also In re Corrugated Container Antitrust Litigation*, 84 F.R.D. 40, 41 (S.D. Tex. 1979). *See generally* Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits*, 71 Colum. L. Rev. 1, 9 (1971).

[18] *See, e.g., In re Folding Carton Antitrust Litigation*, M.D.L. 250 (N.D. Ill. 1979) ($218 million settlement from 24 defendants); *In re Coordinated Pretrial Proceedings In Antibiotic Antitrust Actions*, 410 F. Supp. 680 (D. Minn. 1975) ($180 million from five defendants); *In re Gypsum Cases*, 386 F. Supp. 959 (N.D. Cal. 1974) ($67 million from seven defendants).

Sixth, in addition, certain small defendants confident of their innocence are nevertheless frequently forced by economic pressures to submit to plaintiffs' blackmail demands to avoid being crushed.[19]

Recognition of rights of contribution and claim reduction will end this undisputed reign of terror in massive antitrust actions. Contribution coupled with claim reduction will permit each defendant to negotiate a fair settlement. *See Gomes v. Brodhurst*, 394 F.2d 465, 467 (3d Cir. 1968); *Judson v. Peoples Bank & Trust Co.*, 17 N.J. 67, 93, 110 A.2d 24, 36-37 (1954) (Brennan, J.), *quoting McKenna v. Austin*, 134 F.2d 659 (D.C. Cir. 1943). *See also United States v. Reliable Transfer Co.*, 421 U.S. 397, 408 (1975) ("a rule of fairness in court will produce fair out-of-court settlements").[20]

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[19] Green Bay Packaging Co., Inc. ("Green Bay"), one of the small defendants in M.D.L. 310, had resolved to vindicate its innocence at trial because it believed it had done nothing wrong. After other defendants settled, however, Green Bay, a family-owned business, was faced with the loss of its line of credit unless it resolved its contingent liability. To remain viable, Green Bay had no choice but to accept plaintiffs' demand for $5,557,500.00 (App. A). As George Kress, the founder and president of Green Bay, stated:

> The effect of this extortive settlement practice upon a small, family-owned and managed business is catastrophic. We were threatened with the loss of over 50 years of effort, and coerced into paying an exorbitant settlement rather than being afforded the privilege of ultimately proving our corporate innocence.

Senate Comm. on the Judiciary, Hearings on S.1468 Before the Subcomm. on Antitrust, Monopoly and Business Rights, The Antitrust Equal Enforcement Act of 1979, 96th Cong., 1st Sess. 45 (1979). *See also Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 587 (3d Cir. 1979); *Jeffrey v. Southwestern Bell*, 518 F.2d 1129, 1131 (5th Cir. 1975); *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 234 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); *Reading Indus., Inc. v. Kennecott Copper Corp.*, 477 F. Supp. 1150, 1159-60 (S.D.N.Y. 1979); *Shapiro v. General Motors Corp.*, 472 F. Supp. 636, 659 (D. Md. 1979). *See generally* Janofsky, *The "Big Case": A "Big Burden" on Our Courts*, 66 A.B.A.J. 848, 849 (1980).

[20] *See generally* Polinsky & Shavell, *Contribution and Claim Reduction Among Antitrust Defendants: A Policy Analysis*, 33 Stan. L. Rev.__ (1981) (to be published), an earlier draft of which was prepared at Westvaco's

(footnote continued on following page)

III.

Contribution and Claim Reduction Promote Policies Underlying the Antitrust Laws

The treble-damage remedy of the Clayton Act advances three goals. First, it provides a means by which victims of antitrust violations may be compensated for their injuries. Second, it deprives violators of the antitrust laws of the fruits of their illegal conduct ("disgorgement"). Third, it serves to deter future violations ("deterrence"). *See Pfizer Inc. v. Government of India*, 434 U.S. 308, 314 (1978); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977).

Contribution does not affect the right of a plaintiff to be compensated because under joint and several liability a plaintiff may collect a judgment entirely from any defendant found to have violated the antitrust laws. Accordingly, courts considering whether contribution should be recognized have focused upon the disgorgement and deterrence objectives of the antitrust laws.

A. Contribution Deprives Violators of the Fruits of Their Illegal Conduct

In numerous situations, the absence of contribution permits antitrust violators to go "scot free" or to obtain "sweetheart" deals not commensurate with damages they may have caused.

1. "Scot Free" Violators

If a plaintiff for any reason whatsoever does not name all antitrust violators as defendants, such violators go "scot free" in the absence of contribution. For example, in *Cackling*

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instigation. *Compare* Note, *Contribution In Private Antitrust Actions*, 93 Harv. L. Rev. 1540, 1560-61 (1980), *and* Jacobson, *Contribution Among Antitrust Defendants: A Necessary Solution To A Recurring Problem*, 32 U. Fla. L. Rev. 217, 236-38 (1980) *with* Easterbrook, Landes & Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J.L. & Econ. 331,__ (1980) (forthcoming).

Acres, Inc. v. Olson Farms, Inc., 541 F.2d 242 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977), plaintiffs elected not to sue certain large co-conspirators to avoid disrupting business relationships, and, as a consequence, a single defendant was held liable for the damages caused by all of the co-conspirators. *See* Petition for Rehearing at 4 n.2, *Olson Farms, Inc. v. Safeway Stores, Inc.*, 1979-2 Trade Cases (CCH) ¶ 62,995 (10th Cir.), *en banc rehearing granted and pending* (Dec. 27, 1979).[21]

2. "Sweetheart" Deals

The disgorgement objective of the treble-damage remedy may also be frustrated even if all participants in an allegedly illegal scheme are named as defendants. Plaintiffs may enter into "sweetheart" deals with selected defendants for reasons unrelated to the merits of the claims against such defendants.[22] In the absence of contribution and claim reduction, all damages allocable to a settling defendant remain in the case for purposes of damage calculation against non-settling defendants.[23]

B. Contribution Promotes Deterrence

Contribution promotes the deterrent policies of the antitrust laws by increasing the certainty that all violators will be forced to bear the consequences of their conduct.[24] The effect of no contribution on deterrence was well expressed in *Professional Beauty Supply, supra*, where the court stated:

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[21] *But see Professional Beauty Supply, supra*, 594 F.2d 1179.

[22] *See* Settlements by International Paper Co. and St. Regis Paper Co. (App. A). *See also* page 10 & note 15, *supra*.

[23] Claim reduction discourages sweetheart settlements by ensuring that settlements will be based on the merits and will fairly reflect the illegal gains, if any, located in the coffers of each settling defendant.

[24] *See* Corbett, *Apportionment of Damages and Contribution Among Coconspirators in Antitrust Treble Damage Actions*, 31 Fordham L. Rev. 111, 137 (1962); *Panel Discussion: Private Actions — The Purposes Sought and The Results Achieved*, 43 Antitrust L.J. 73, 104 (1974). *See also* Note, *Contribution In Private Antitrust Actions*, 93 Harv. L. Rev. 1540, 1544-45 (1980).

> This possibility of escaping all liability might cause many to be more willing, rather than less willing, to engage in wrongful activity. . . .
>
> To deny contribution would be to dilute the deterrent effect of the antitrust laws, since a participant in an antitrust violation could escape all responsibility for its wrongdoing.

Id. at 1185. For this reason, contribution is particularly effective in deterring intentional misconduct. *Id.* at 1186. *See Olson Farms, supra*, 1979-2 Trade Cases (CCH) ¶ 62,995, at 79,706-07 (Holloway, J., dissenting); Recent Developments, *Contribution Among Antitrust Defendants*, 33 Vand. L. Rev. 979, 983 (1980).[25]

Furthermore, middle level managers are often the persons whose activities lead to alleged antitrust violations, and their behavior is more affected by the possibility of detection and its impact upon their careers than by the magnitude of their employers' potential penalties:

> The deterrent effect of a determination that those managers violated the antitrust laws would not be tied to the magnitude of liability because firm sanctions against such managers depend primarily upon the fact of violation. Under such circumstances, allowing contribution would best deter antitrust violations, for it would increase the probability that the company will be held liable for those violations and hence increases the frequency of company sanctions against overzealous employees.

Contribution In Private Antitrust Actions, supra, 93 Harv. L.

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[25] *See also Heizer Corp. v. Ross*, 601 F.2d 330, 334 (7th Cir. 1979); *Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co.*, 385 F. Supp. 230, 238-39 (S.D.N.Y. 1974); *Globus, Inc. v. Law Research Serv., Inc.*, 318 F. Supp. 955 (S.D.N.Y. 1970), *affirmed*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971).

Rev. at 1546 (footnotes omitted). *See* Polinsky & Shavell, *Contribution and Claim Reduction Among Antitrust Defendants: A Policy Analysis*, *supra*, 33 Stan. L. Rev.__ (1981).[26]

Accordingly, contribution and claim reduction promote policies of the antitrust laws by ensuring that antitrust violators will be held accountable for their conduct.

IV.

Contribution and Claim Reduction Will Not Complicate Antitrust Cases

Recognition of rights of contribution and claim reduction for defendants in antitrust price-fixing cases will neither add substantive issues nor present manageability problems.

A. Contribution Will Not Add New Issues to Antitrust Price-Fixing Cases

Plaintiffs in a price-fixing case must prove violation, impact, and damages. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 560 (1931). In order to recover damages in a price-fixing case, plaintiffs prove sales by participants in the alleged illegal activity and the amount of damages resulting therefrom. Because these issues determine the applica-

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[26] Major corporations have adopted antitrust compliance programs in which employees are instructed in antitrust principles and directed to conform their conduct to the law. Employees who violate antitrust compliance programs are subject to discipline. *See generally* J. Garrett, *Antitrust Compliance* (1978); *Panel Discussion: Varied Approaches to Antitrust Compliance*, 48 Antitrust L.J. 53 (1980). Furthermore, there are substantial criminal sanctions under the antitrust laws which apply to both individuals and corporations.

bility of contribution among defendants, an antitrust price-fixing case will not be complicated by contribution.[27]

Opponents of contribution argue that its availability should turn on whether or not a defendant is an intentional violator, and from this they argue that contribution would procedurally complicate antitrust cases by injecting the issue of intent into treble-damage cases. But a rule of contribution should be available, irrespective of intent, according to the same standard as is applied to determine liability to a plaintiff in the first instance. Any effort to distinguish between intentional and unintentional violators ignores the basic fairness requiring contribution.[28] *See* Note, *Contribution in Antitrust Treble Damage Actions*, 6 J. Corp. L. 141, 193-94 (1980).

B. Contribution Will Not Present Procedural Manageability Problems

The assertion of cross-claims in multi-defendant cases offers the advantage of consolidating the antitrust and contribution claims in a single proceeding. Fed. R. Civ. P. 13 permits a defendant to state a cross-claim "against a co-party arising out of the transaction or occurrence that is the subject matter . . . of the original action." Indeed, this rule permits the single adjudication of claims that at common law might otherwise have resulted in separate actions. *See Southern Construction Co. v. Pickard*, 371 U.S. 57, 60 (1962).

If contribution from a non-party is appropriate, Fed. R. Civ. P. 14 provides the mechanism for asserting third-party claims. In such instances the district court will have the discretion to have one trial or to order separate trials under Fed. R. Civ. P. 42(b) if it perceives a risk that the antitrust action will become too complicated.

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[27] Claim reduction would have the additional salutary effect of simplifying antitrust cases because a plaintiff need only prove the liability of non-settling defendants and does not have to prove damages attributable to settling defendants.

[28] *See* page 14 & note 25, *supra*.

In sum, the achievement of fairness in the allocation of damages through recognition of rights of contribution and claim reduction in antitrust cases presents no obstacles to the administration of justice. In any event, speculative savings of judicial resources do not warrant the injustices to antitrust defendants which otherwise occur.[29]

CONCLUSION

For the foregoing reasons, Westvaco requests this Court to reverse the decision of the Court of Appeals for the Fifth Circuit and to remand to the district court with instructions to permit the assertion of contribution and claim reduction.

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Respectfully submitted,

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[29] As this Court noted in *United States v. Reliable Transfer, supra*, "[p]otential problems of proof in some cases hardly require adherence to an archaic and unfair rule in all cases." 421 U.S. at 407.

APPENDIX

Appendix A

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION, M.D.L. 310

Settlements in Class Actions through January 1979

Settling Defendants (Listed by categories in approx. order of Settlement)	*The % of Defendants' Market*	*Approximate Dollar Amount per % point of defendant's market share*	*Amount Paid In Settlement*
FELONY INDICTEES			
1. International Paper	8.3	$1.00 million	$ 8,300,000
2. Champion International Hoerner Waldorf	5.36	$4.50 million	$24,120,000
3. Weyerhaeuser	7.83	$5.00 million	$39,150,000
4. Owens-Illinois	5.45	$6.00 million	$32,700,000
5. Olinkraft	1.225	$6.00 million	$ 7,350,000
6. Continental Group	4.22	$6.50 million	$27,430,000
MISDEMEANOR INDICTEES			
1. Boise Cascade	2.826	$3.50 million	$ 9,891,000
2. Container Corp. of America	8.56	$4.00 million	$34,240,000
3. Inland Container	7.29	$4.75 million	$34,627,500
4. St. Joe Paper	2.625	$4.75 million	$12,468,750
5. Stone Container	3.055	$4.75 million	$14,511,250
UNINDICTED			
1. St. Regis Paper	3.97	$ .43 million	$ 1,700,000
2. Union Camp	3.70	$2.00 million	$ 7,400,000
3. Diamond International	.50	$2.00 million	$ 1,000,000
4. Dura-Containers	.375	$2.00 million	$ 750,000
5. Chesapeake	1.26	$2.40 million	$ 3,024,000
6. Longview Fibre	2.58	$2.50 million	$ 6,450,000
7. Willamette Industries/ Western Kraft East/ Corco	4.18	$2.70 million	$11,286,000
8. Menasha	1.67	$2.75 million	$ 4,592,250
9. MacMillan Bloedel MacMillan Bloedel Containers	2.11	$4.00 million	$ 8,440,000
10. U.S. Corrugated-Fibre Box	.767	$4.00 million	$ 3,069,120
11. Green Bay Packaging	1.71	$3.25 million	$ 5,557,500